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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 330.

OPP COTTON MILLS, INC., ET AL., *Petitioners,*

v.

ADMINISTRATOR OF THE WAGE AND HOUR DIVISION OF THE DEPARTMENT OF LABOR, *Respondent.*

On Certiorari to the United States Circuit Court of Appeals Fifth Circuit.

SUPPLEMENT TO REPLY BRIEF FOR PETITIONERS.

BEN F. CAMERON,
W. GORDON MCKELVEY,
LESTER E. WILLS,
Attorneys for Petitioners.

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Our apology for asking the indulgence of the Court in considering this further reply brief is that some of the material thought to be important has not heretofore been available.

Differentials.

We have heretofore taken the position that the establishment of differentials within the industry was contemplated by Congress and all those instrumental in getting

the legislation passed. We bring to witness a few excerpts from statements of those responsible for the Wage and Hour Law.

The quotations which follow had reference to the original Wage and Hour Law introduced in 1937 and popularly known as the Black-Connery Act (Senate Bill 2475). The present law is the outgrowth of the hearings had on that law.

The message of the President to the Congress transmitting this bill contains these statements (Joint hearings and reports on Fair Labor Standards Act of 1937, Parts I-III, p. 3):

> "Even in the treatment of national problems there are geographical and industrial diversities which practical statesmanship cannot wholly ignore. Backward labor conditions and relatively progressive labor conditions cannot be completely assimilated and made uniform at one fell swoop without creating economic dislocations.
>
> "Practical exigencies suggest the wisdom of distinguishing labor conditions which are clearly oppressive from those which are not as fair or as reasonable as they should be under the circumstances prevailing in particular industries. Most fair labor standards as a practical matter require some differentiation between different industries and localities. . . . .
>
> "Allowing for appropriate qualifications and general classifications by administrative action, it should also be possible to put some floor below which the wage ought not to fall. . . . .
>
> "With the establishment of these rudimentary standards as a base we must seek to build up, through proper administrative machinery, minimum wage standards of fairness and reasonableness, industry by industry, having due regard to local and geographical diversities and to the effect of unfair labor conditions upon competition in interstate trade and upon the maintenance of industrial peace."

As sustaining the argument we have heretofore made that the law by its spirit and terms requires the Administrator to recognize existing differentials and to take a course which will not do violence to them, we quote a statement by the representative of the Department of Justice before the Joint Committee of the Congress (*ibid.*, p. 40):

> "The differential which the Board would embody in the order is not a differential which the Board establishes; it is a differential which already exists but which it recognizes, because the Board is required to find the value of the services at the point which is under consideration. Now, if the Board fixes south of a certain line, a differential of a dollar, it is fixing that because it finds that that is what the differential is before it fixes the differential. Its authority in each case is to find what the value is in the community, taking into consideration the costs of living, the collective bargaining prices, and all of the facts set forth in the Act. . . .
>
> "The Board is authorized to recognize in each community the factors in its life which produce a differential, and to fix that differential into its minimum as collective bargaining will be to fix it into its maximum."

The explanation made, in presenting the bill to the Senate, by the Chairman of the Committee on Education and Labor in response to a question by Senator Overton is along the same line (Congressional Record, Vol. 81, No. 7, p. 7661):

> "Mr. Overton: . . . . The situation with reference to the lumber industry in the South is that on account of the nature of the timber and the character of the logs very much less timber can be produced by manpower there than in other sections of the United States, as, for instance, on the West Coast; and if the wage scale in the Southern lumber industry were approximately the same or nearly the same as that of the West Coast, it would be impossible for the Southern lumber industry to compete with the Western production. Does the bill take care of a situation such as that?

"Mr. Black: The bill recognizes the fact that in fixing a minimum wage—which, as I said in the beginning, is a living wage—there must be taken into consideration the diversities in industry which exist throughout the country; the cost of living in various places, for example.

"Mr. Overton: Diversities in the same industry?

"Mr. Black: Certainly. . . . ."

The response made by the Chairman to a question by Senator Harrison shows the same concept on the part of the responsible members of Congress (*ibid.*, p. 7662):

"Mr. Harrison: The question of the Senator from Louisiana and the answer to it cause me to ask a question—the same rate, then, must be fixed by the Board for sawmills, say, or textile industries, even though one might be located in a very large center where the cost of living would be higher and another one in a rural settlement where the cost of living might not be so high, even though both operated in the same state?

"Mr. Black: No, I did not say anything by which I intended to leave such an impression. That is quite a different thing . . . ."

Classification by Administrator—Definition.

The following provision of Section 8(c) of the Act makes exceedingly important the action of the Administrator in preventing the Committee from making classifications by the expedient he adopted of excluding the wool classification from his definition and including other dissimilar classifications:

"The Industry Committee for any industry shall recommend such reasonable classifications within the industry . . . and shall recommend for each classification in the industry the highest minimum wage rate which the Committee determines will not substantially curtail employment *in such classification.*" (Italics supplied).

Regardless of the motive for the tactics pursued by the Administrator with respect to his definition, the practical effect of them was to eliminate differentials from the consideration of the Committee. In fact no mention of differentials is found in the Committee's proceedings until just before their final adjournment.

While two committees representing two classifications of the same industry were meeting in adjoining rooms, consisting largely of the same personnel, each did in fact establish a classification within the industry, the wool segment receiving a 36 cent minimum and the rest a 32½ cent minimum. As a practical proposition, therefore, the Administrator's action closed the eyes of the Textile Committee to its duties with regard to classifications and kept that Committee effectively from giving proper consideration to this important phase of their duties.

The harmful effect of this result to these petitioners can hardly be overestimated. Particularly is this true when it is considered that the Administrator stated definitely (R. 309) that he could consider dislocations of employment only on an industry basis and his position is adopted by the argument of opposing counsel.

Under the express terms of the statute, the Committee would have given consideration to the question of whether the minimum set by them would "substantially curtail employment in such classification".

If, for instance, the Committee had decided that mills situated in communities of less than 5,000 people should have a differential, consideration would have been given to the position of the petitioner in comparison with those similarly situated. Under the method followed by the Committee under the Administrator's guidance, the only consideration given petitioner's situation was in comparison with the large mills of the Eastern Seaboard and those of the country in general.

Substantial Evidence.

The attitude of the Administrator throughout in dealing with questions of procedure and of evidence is clearly understood when one considers the statement made by his General Counsel at the opening of the hearing (original brief, p. 163):

> "The lawyers present will realize that this is not a judicial or a quasi-judicial hearing. It is hardly even a quasi-legislative hearing. It is merely a fact finding inquiry designed to serve as the basis for administrative action."

This attitude is quite understandable inasmuch as this was the first effort of the Administrator at the enforcement of this perfectly new act. He was "blazing a trail" which had not been laid out and there was no precedent to guide him.

It is plain, nevertheless, that he bottomed the whole proceeding on a mistake of law and the errors committed by him are logically attributable to this fundamental misconception of the nature of the task he was performing. (See *Shields* v. *Utah*, R. R. C. 305 U. S. 177; 83 L. Ed. 111.)

The Administrator has, of course, duties which are executive, legislative and ministerial; but he has also duties which are judicial. While sitting as a judge on the actions of the Committee the functions he performed were judicial. His only duty was to sit as a court would sit and hear evidence and determine judicially whether the Committee had proceeded according to law and whether its findings were supported by the evidence. When he adjudged those facts his duty in that respect had been fully performed.

This applies to the character of evidence on which he relied, as well as to the course of procedure he followed. We do not understand that it is seriously challenged by opposing counsel that the findings of fact of the Administrator rest in large part on the studies and bulletins placed in evidence by the employes of the Labor Department and

like documents. The main one was, of course, Bulletin 663 and the court below singled it out as an example of the substantial evidence which it found to sustain the Administrator's finding. (R. 362)

It is plain, as we have heretofore pointed out, that the court below would not have considered this and similar bulletins proper evidence before the Administrator sitting judicially except for the interpretation it placed on the decision of this Court in *N. L. R. B.* v. *Waterman*, 309 U. S. 206, decided just before submission of this case to the Court below. That court had, as a matter of fact, held definitely:

> "A suit to enforce an order of the National Labor Relations Board is a judicial proceeding, and the court is vested with exclusive jurisdiction of the cause . . . . and will not consider irrelevant, immaterial or incompetent evidence. . . .
>
> "The rules of evidence prevailing in courts of law or equity are controlling in a suit to enforce an order of the National Labor Relations Board." (N. L. R. B. v. Bell Oil & Gas Co., 98 F. (2) 406.)

We do not understand that there is any serious contention that these "studies" containing, as they do, data gathered from many sources and the opinions and deductions of witnesses not subjected to cross examination, would be competent evidence in a court. In that connection, it is noteworthy that Congress omitted from the Wage and Hour law the provision placed in the Wagner Act exempting hearings from the rules of evidence. Congress had had the benefit of nearly three years' experience under that law and the chance to observe its operation and to read the opinions of the courts with respect to it. In fact, all of these are referred to in the Committee hearings.

The only logical inference, therefore, is that this omission was made deliberately, giving rise to the implication that Congress felt that it was a mistake thus to lay aside rules of proof having the sanction of the ages.

While we do not "shy away" from the use of the word "competent", it is really not necessary for this Court to hold that it was not proper for the Administrator to admit

these bulletins and give them consideration. In fact, we do not contend that they were inadmissible in the hearing before the Administrator.

The question before this Court is whether they constitute substantial evidence in a judicial proceeding and are entitled to serve as the main—and ofttimes the sole—basis for the findings of the Administrator.

We have not thought it necessary to reply to the contentions of our adversaries that these documents are rendered admissible in a court of law by the exceptions to the hearsay rule embracing inquests of coroners, government publications, and the like. Properly authenticated copies of publications of figures required by law to be compiled—the Decennial Census, for instance—are admissible in a court of law. Not so of such informal, *ex parte* dissertations as these. Such circulars are distributed by the various Departments by teeming thousands.

The Interstate Commerce Commission Cases listed on pages 68 et seq. of Respondent's brief do not justify the construction given them by counsel. A glance at one or two of the cases will suffice.

The case establishing liberality in admitting evidence in proceedings before the Commission—*Interstate Commerce Commission* v. *Baird,* 194 U. S. 25—arose on a petition by the Commission to require a witness to produce records and give testimony, which had been refused on the ground that the records in question were not relevant. The purport of that decision is that the Commission proceeding *ex parte* is privileged to explore in a wide field in its effort to perform its administrative functions.

In none of these cases has the Court held that hearsay or improper evidence may serve as the basis for court action with respect to the *prima facie* findings of the Commission. All that has been held is that the mere admission into the record of hearsay evidence will not contaminate the good evidence and warrant a repudiation of the Commission's findings merely because there was incompetent evidence mixed with the other.

The cautious approach taken by this Court with respect to the rule that administrative bodies shall be given a wide latitude in performing their duties is illustrated by the opinion of Mr. Justice Lamar in one of the cases cited (*Interstate Commerce Commission* v. *L. & N. Railroad*, 227 U. S. 88, 93) from which a sentence is quoted:

> "But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended."

The Court will understand that we are not taking the position that it is under any duty to weigh witness against witness or consider their credibility. What we do point out is that, on most if not all of the material findings of the Administrator, there was a wealth of competent and credible evidence by people with knowledge of the facts, and that he chose to reject all of that and to base his findings solely on one or more of these informal documents or on something equally unsubstantial.

We cite a couple of instances: One of the vital questions of fact in the case was whether the cost of living in the communities of which these petitioners and those like them were citizens was materially less than the cost of living in the larger centers of the Carolinas and the North where the large units are located. It is one of the elements stressed in the Congressional debates and is one of the elements given important place in the statute.

Let it be borne in mind that the Administrator based his finding on this vital matter solely and entirely on Industry Committee Exhibit 10 (R. 321 et seq.) beginning at page 1921 of the record. That bulletin was not only not competent evidence—that is, was not substantial evidence—but it was wholly without probative value on the issue before the court. That bulletin related to cities varying from 10,000 to 3,000,000 population. That did not touch the small-mill group at all.

Petitioner was located in a community of less than 3,000 people. It was typical of the small-mill group. Of the 537 mills in this group (constituting 31% of the industry) 259 of them were located in communities having less than 2,500 population, while 504 were in cities of less than 10,000 population. (R. 1469)

The only proof, therefore, which the Administrator had before him on this issue was that offered by the petitioners and their witnesses who gave testimony from personal knowledge that living costs in these small rural communities did not average much more than half of such costs even in adjacent urban areas.

The same is true with respect to the character of proof on such issues as productivity of labor, tax levels and the like —indeed on practically all the important issues in the case.

Respectfully submitted,

BEN F. CAMERON,
Counsel for Petitioners.